UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TREBOL MOTORS CORPORATION

and Case 24-CA-7359

UNION INSULAR DE TRABAJADORES INDUSTRIALES
Y CONSTRUCCIONES ELECTRICAS

Harold E. Hopkins, Esq., of Hato Rey, Puerto Rico,
for the General Counsel.

Tristan Reyes-Gilestra, Esq., of Hato Rey, Puerto
Rico, for the Respondent.

SUPPLEMENTAL DECISION

JAMES L. ROSE, Administrative Law Judge: On February 13, 1997, I issued a Decision in this matter recommending that the complaint be dismissed in its entirety. On November 6, 1997, the Board remanded the matter to me in order that I consider certain arguments made by Counsel for the General Counsel in his exceptions to my Decision and that I prepare a Supplemental Decision. Specifically, the Board ordered that I:

1. Make credibility resolutions concerning, and evaluate, the testimony of employee Migdalia Sanchez that her supervisor Richard Canelas said "the union was no good" and "I know who is heading this, and it is Ms. Elisa (Gattorno)." These statements of Canelas are alleged to have created the impression of surveillance of employees' union activity in violation of Section 8(a)(1) of the Act.

2. ". . . explicitly address the General Counsel's arguments challenging the legitimacy of the Respondent's stated reasons for discharging (the six alleged discriminatees). In this connection, the judge shall determine, consistent with the entire record, whether the Respondent satisfied its Wright Line burden of demonstrating that it would have discharged these employees even in the absence of their union activities."

ANALYSIS

1. Impression of Surveillance.

As noted above, Migdalia Sanchez testified that supervisor Richard Canelas, sometime between November 27, 1995, (when the employees signed authorization cards) and December 6, told her that "the union was no good" and "I know who is heading this, and it is Ms. Elisa (Gattorno)." While I dealt with other testimony concerning the alleged creation of the impression of surveillance in my initial Decision, I did not consider this particular testimony.

Canelas did not testify. And I found Sanchez to be generally credible. Therefore, I conclude that Canelas made the statement attributed to him.

"In determining whether a respondent has created an impression of surveillance, the Board applies the following test: whether employees would reasonably assume from the statement in question that their union activities have been placed under surveillance." *United Charter Service,* 306 NLRB 150, 151 (1992). The statement by Canelas, I conclude, meets this test, particularly since in fact Gattomo was a leader in the organizational campaign and had given Sanchez an authorization card.

I reverse my earlier determination and conclude that the Respondent did create the impression of surveillance in violation of Section 8(a)(1) of the Act. However, inasmuch as this is the only unfair labor practice I find was committed by the Respondent and the employees subsequently voted in favor of representation by the Union, I conclude that the traditional remedy in such cases would serve no purpose. I therefore will recommend dismissal, notwithstanding the Respondent committed the violation alleged. *American Steel Building Company, Inc.,* 270 NLRB 11 (1984).

2. The General Counsel's Arguments of Pretext.

In my initial Decision, I concluded that the Respondent proved that it would have discharged the six salespersons even in the absence of the union activity and thus met its burden under *Wright Line, a Division of Wright Line, Inc.,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 393 (1983). In its remand, the Board ordered me to consider five arguments raised by Counsel for the General Counsel in his brief in support of exceptions that the Respondent's reasons were pretextual.

a. "First, in January 1996, the Respondent lowered its sales quota standard and modified its disciplinary system at its Ponce and Santurce Branches, just 3 days after it fired Borges, Avendano, and Ocasio (a Union organizer and the Union observer at the January 17, 1996 Board election)."

I do not believe this fact means that the discharges for failing to meet the quota system put into effect prior to any union activity was pretextual. In the April 28, 1995, memo in which the quota system for the remainder of 1995 was announced, the Respondent further stated that the system "will be revised for calendar year 1996." Such suggests, and I conclude, that irrespective of the discharges, the Respondent would have made some change in the quota system in January 1996.

Implicit in the General Counsel's argument is that after the dischrges, the Respondent lowered the quota to a level the discriminatees would have met. Therefore, to hold them to the

higher standard must have been pretextual. The revised system was based on a calculated average sale at Stop 18 of 5.6 units per month (which the Respondent put in the form of a quota of five units one month and six the next). Though ocassionally having sold five or six units a month, none of the discharged individuals made close to the new average during 1995. Thus Avendano averaged 2.9; Ocasio 4.3; Borges 3.9; Gattorno 3.8; Sanchez 3.2; and Platal 3.6. Had the new standard been in effect throughout 1995, only Ocasio and Borges, arguably, would have met their quota in sufficient months not to have been discharged. However, I conclude that such does not mean that changed the quotas three days after the final three discharges was pretextual.

b. "Second, the Respondent discharged the six alleged discriminatees for failing to meet the sales quota, yet it allowed two probationary employees, Michelle Aleman and Jorge L. Negron, to remain employed until May 1996 even though they never met the 1995 sales quota."

Aleman and Negron were hired in October 1995 and were probationary employees for three months in 1995, during which Aleman sold a total of two units and Aleman sold three. Since these employees were retained, the General Counsel argues that to have discharged more senior employees with much better sales records proves the discharges were pretextual. I disagree. This is not a matter of choosing which employees to layoff, as for instance, in a reduction in force. In such cases, keeping a poor producer in favor of one whose production is much better does imply pretext. Here the senior employees were under a quota system, were disciplined for not meeting their quotas before there was any union activity, and finally were discharged on failing for the fourth month. Aleman and Negron were not in the same situation. They had not failed to meet their quota for the fourth month. Further, to keep probationary employees on the hope that they would learn and become productive is not so unreasonable a management decision as to imply pretext. And, the were subsequently discharged.

c. "Third, the Respondent did not apply its 1995 sales quota policy in the same manner at its Ponce Branch." Ricardo Gonzalez, the Respondent's General Manager, testified[1] the Ponce situation was different and that as a result, the same quota system was not used there. His testimony in this regard is not contested and was generally credible. In addition, this testimony is consistent with documentary evidence predating the union activity which shows that quotas for Ponce were less than for Stop 18. Accordingly, I do no believe that having a different quota system for the Ponce branch tends to prove that the discharges were pretextual.

d. "Fourth, the Respondent allegedly deviated from its 1995 sales quota policy by issuing no discipline to Millie Ruiz and Jose Diaz-Monge for their failure to meet, for the third time, the requisite sales quota." I find, from the Respondent's uncontested records, that Ruiz had noncompliance months in June and November and that in fact he was given a first warning in July and a second in December. Thus as to Ruiz, I find the General Counsel's fact assertion to be incorrect. Diaz had noncompliance months in June, November and December, for which he received a first warning in July and a second in December. He was not given a third warning

[1] Gonzalez's name does not appear in the index of the transcript, it appearing that his mother and the Respondent's President, Conchita Gonzalez, testified from page 272 on. This is an error. Ricardo Gonzalez's testimony begins at page 275 of the transcript. There were many malfunctions in the taping of this matter; however, counsel for the parties stipulated that the transcript was sufficient.

for missing the quota in December, since, according to the Respondent, "the term of the year had ended, and it had no disciplinary effect."

That Diaz was not given a disciplinary warning while Borges, Avendano and Ocasio were discharged for having failed for the fourth time to meet the quota raises a suspicion. The Respondent argues that to have given Diaz a warning would have been idle, since the everyone would start oven with the new year, whereas Borges, Avendano and Ocasio demonstrated that they would not (or could not) meet the quotas four months. I cannot totally discount the Respondent's management decision in this respect, and without more, I cannot conclude that simply not giving Diaz a third warning makes the discharges unlawful. Suspicion is not sufficient proof on which to base the finding of a violation of the Act.

e. "Finally, Ocasio testified that he should not have been discharged for failing to meet the sales quota in December 1995 because, pursuant to the Respondent's carryover policy, his December total of six autos sold should have been credited with the extra auto that he sold in the preceding month."

While Ocasio did testify there was a carryover policy, this testimony was uncorroborated by other witnesses or documentary evidence. Ricardo Gonzalez testified that there was no such carryover policy for 1995, and nothing in the April 28, 1995, memo would suggest there was. In 1996, the Respondent did announce a carryover policy to the effect that no warning would be given if an employee's total sales for the year was equal to or greater than the quota total. Even if this policy had been in effect (and it is the only indication in the record of carryover other than Ocasio's testimony) Ocasio still would not have met his quota for 1995.

Whether there was a carryover policy is at least a matter of argument. However, the issue here is not whether the Respondent perfectly applied its system of discipline and discharge for failing to meet quotas. The issue is whether the asserted reason for discharging Ocasio and the others was pretextual. I conclude it was not, even if in the case of Ocasio, a carryover should have been applied. While deviation from an established system may suggest pretext, such is not dispositive. Nevertheless, I do not credit Ocasio and I conclude that the Respondent discharged him for failure to meet his sales quota.

On this point I note that the Respondent never gave a one week suspension for failing to meet a quota a third month, though such was stated the April 28 letter. Uniformly giving a lesser penalty to those failing to meet their quota a thrird month, I conclude, does not establish that discharging those failing a fourth time was pretextual.

The quota system under which these employees were discharged was established months before any union activity, as were their initial warnings for failure to meet the quota. Indeed, but for the fact that the Respondent waived the quota system for September and October due to adverse weather, all the alleged discriminatees would have been discharged before the advent of any union activity. There is minimal evidence of union animus. Finally, before and after the events here the Respondent has discharged salespersons for failing to meet established quotas. On these facts, I conclude that the discharges were for cause and would have occurred in the absence of any union activity.

In accordance with my initial Decision, supplemented here, I issue the following recommended:[2]

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C.
February 9, 1998

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James L. Rose
Administrative Law Judge

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes